

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 28, 2021 at 2:00 p.m.

1.	<u>21-21572-E-13</u> <u>PGM-1</u>	CINDY FORGRAVE Peter Macaluso	CONTINUED MOTION TO AVOID LIEN OF JONATHAN NEIL & ASSOCIATES, INC. 6-4-21 [15]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on June 4, 2021. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Avoid Judicial Lien is XXXXXX.
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This Motion requests an order avoiding the judicial lien of Jonathan Neil & Associates, Inc. ("Creditor") against property of the debtor, Cindy Ann Forgrave ("Debtor") commonly known as 12691 Angle Ct, Penn Valley, CA 95946, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$132,955.81. Exhibit A, Dckt. 18. An abstract of judgment was recorded with Nevada County on November 21,

2019, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$650,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$237,908.06 as of the commencement of this case are stated on Debtor's Schedule D. *Id.* Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$557,000.00 on Schedule C. *Id.*

Creditor's Opposition

Creditor opposes the Motion to Avoid Judicial Lien on the basis that:

- A. Debtor's claim of valuation is not supported by competent evidence;
- B. Debtor has apparently misrepresented to the court facts evidencing the true balances of any existing loans; and
- C. Remaining equity would leave sufficient funds to pay Creditor's lien.

First, Creditor contends that the motion and supporting declaration are devoid of any evidence that might support Debtor's "self-serving and conclusory statement that the Property is worth \$598,000.00." Dckt. 49, Opposition, 2:24-25. There is no appraisal supporting the alleged current value, no statement as to how the value was determined, and no reference to any outside source for a verification of value. *Id.* Creditor further questions Debtor's line of reasoning that "being a homeowner renders one qualified or competent to offer admissible evidence as to property valuation." *Id.*

Second, Debtor claims a mortgage balance in the amount of \$102,000.00; yet Creditor asserts that there is no evidence of any such outstanding voluntary lien on the Property and that Debtor has failed to submit recent statements of the loan balance. *Id.*, at 3:10-12.

Third, even admitting, for the sake of discussion, that Debtor's representations of the allowable homestead exemption and loan balance are accurate, there would be sufficient equity in the Property to satisfy Creditor's lien. *Id.*, at 3:13-15. On Zillow.com, the value of the Property is estimated at \$1,003,000.00. Dckt. 50, Ex. 1.

Debtor's Reply

Debtor contends that both the "Zillow report" and Creditor's declaration concerning the Zillow estimate are inadmissible hearsay. Dckt. 60. Debtor also explains that she determined the value of the Property by personally viewing it for defects and by accounting for the fact that it is a modular home that depreciates in value every year. *Id.* Debtor has testified to damages to the Property including leaks in the roof, water damages to the kitchen floor, the need for dry-wood replacement in the master bedroom, and leaks in the sky lights, which are also not squared, causing cracks in the wall. Dckt. 17, declaration, ¶ 9.

DECISION

This being a Contested Matter, the parties have the right to present evidence as would be in

an adversary proceeding. Fed. R. Bankr. P. 9014(d). Such process in this District is done by the filing of direct testimony statements for non-hostile witnesses, and then the presentation of that witness at an evidentiary hearing for focused direct examination, cross-examination, and redirect. L.B.R. 9017-1.

Debtor's Evidence of Value

As the owner, the Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). While it is evidence of value, Debtor's opinion is the most ephemeral evidence of value for the residence. Nonetheless, evidence of value has been provided in the Debtor's opinion.

Debtor's Direct Testimony is provided in the Declaration filed in this Contested Matter, which states the following regarding the condition of the Property:

9. The property has a (3) bedroom, (2) bath modular (3) piece home which is deteriorating in value as the floors in the kitchen have water damages and needs replacement.

There are multiple leaks in the roof and it needs replacement.

The master bathroom needs floor and dry-wood replacement due to the water heater damages which continues to leak. The sky lights leak and are not squared correctly, causing cracks in the walls, which I estimate would be approximately \$40,000.00 to repair.

Declaration; Dckt. 17, at ¶ 9. Debtor, as the owner of the Property, states her conclusion that the Property has a value of \$598,000.00. *Id.*, ¶ 8. As discussed below, this is not the fair market value of the Property, but the projected net sales proceeds after the sale of the Property. Schedule A, Dckt. 1 at 13; stating "FMV \$650k less cost of sale (8%) of \$52,000 = \$598,000)" in the additional information provided concerning the Property.

Creditor's Evidence of Value

The Appraisal Report of Daniel Ketcham was filed in opposition to the Motion. Dckt. 111 at 4 - 40. Mr. Ketcham states his opinion that the Property had a value as of the commencement of this case on April 29, 2021, of \$670,000. *Id.* at 23. This opinion is a Sales Comparison valuation, and not by cost or income valuation for the Property.

The comparable properties used are set out on pages 27 - 28 of Docket 111. The Property at issue in this case is 49.84 acres in size. Of the four comparable properties, the first is 10 acres, the second is 5 acres and the third is 21.17 acres, for which upward adjustments in value are made of \$200,000, \$225,000, and \$50 respectively.

Determination of the Judgment Lien

The court has determined that Debtor's homestead exemption pursuant to California Code of Civil Procedure § 704.730 is in the amount of \$460,000. Dckt. 100. The Debtor states under penalty of

perjury that the fair market value of the property subject to Creditor's judicial lien is \$650,000. Debtor then seeks to reduce the fair market value to a net sales proceeds value by deducting 8% for costs of sale.

The term "fair market value" is one commonly used in bankruptcy cases and well known to practitioners. One simple definition is the fair market value of a property is the price which a willing buyer, under no compulsion to purchase, and which a willing seller, under no exigency to sell will pay and accept for a sale of the property. As explained by the California Supreme Court in *City of San Diego v. Neumann*, 6 Cal. 4th 738, 744 (1993):

In striking this balance between the public's need and the owner's loss, our Legislature has provided that the measure of compensation for property taken pursuant to the government's powers of eminent domain is its "fair market value." (Code Civ. Proc., § 1263.310.) It has defined "fair market value" as "the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, *each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.*" (§ 1263.320, italics added.)

It is not a net sales price.

EVIDENTIARY HEARING

The Evidentiary Hearing in this Contested Matter is being conducted at 2:00 p.m. on October 28, 2021. Both Creditor and Movant has presented the court with their Supplemental Pleadings for the Evidentiary Hearing.

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on June 9, 2021. By the court’s calculation, 20 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The hearing on the Objection to Confirmation of Plan is XXXXX.

The Chapter 13 Trustee, David Cusick (“Trustee”), opposes confirmation of the Plan on the basis that Plan relies on Motions to Avoid Liens.

DISCUSSION

Trustee objects that the Debtor’s Plan relies on Motions to Avoid Liens. *See* Dckt. 15 and 21. The Trustee is not certain that Debtor can afford the plan payments unless these motions are successful. These motions have been set for hearing at 2:00 p.m. on July 20, 2021.

Objection filed by Creditor Cadles of West Virginia

The deadline for filing an Objection was set for June 11, 2021. Creditor filed their Objection on June 24, 2021. Dckt. 31. Notwithstanding this untimeliness, the court will treat this objection as a pleading in support of Trustee’s Objection providing supplemental information which identifies a specific claim that is the subject of Trustee’s Objection.

Creditor objects on the basis that the proposed Plan does not provide for Creditor’s secured claim. Creditor asserts that a money judgment was entered in favor of Creditor against Debtor in the Nevada County Superior Court in the principal amount of \$282,628.05, with the abstract of judgment having been recorded on December 15, 2020 in the Official Records of Nevada County. The money judgment entered against the Debtor and a copy of the Abstract of Judgment are attached to Creditor’s Proof of Claim 2-1. Debtor has misclassified Creditor as an unsecured debt in an attempt to modify Creditor’s claim and seeks to avoid the judgment lien.

Creditor argues that this case was filed in bad faith and alleges that Debtor's sole purpose in filing for Chapter 13 bankruptcy is to avoid the sale of her residence under Creditor's judgment lien. Creditor explains that after summary judgment was granted in its favor in the underlying state court action, the Debtor quit-claimed her interest in the subject property to third parties, forcing Creditor to bring a fraudulent transfer lawsuit in Nevada County Superior Court. In response to that lawsuit, the third parties quit-claimed their interests back to Debtor and the bankruptcy filing followed. ^{FN.1.}

FN. 1. That a judgment debtor would file bankruptcy to avoid the sale of a residence by a judgment creditor is not surprising or improper. However, when the judgement debtor begins transferring away assets and fraudulent transfer litigation ensues, that may be a different story.

Creditor further asserts that Debtor has substantially undervalued her residence which sits on 49 acres.

Decision

Debtor's two Motions to Avoid the Liens are currently pending and with respect to any discovery valuation issues, these will be addressed through those motions and as such Creditor can prosecute its part of the contested matter as appropriate.

The court continued this Objection for to be heard on the same date and time as the individual Motions to Avoid Lien set for hearing at 2:00 p.m. on July 20, 2021.

Creditor's information relating to the Trustee's Objection piqued the court's curiosity about what is being alleged concerning this real property. On Schedule A/B Debtor lists the residence in Penn Value of \$598,000 on Schedule A/B. Dckt. 1 at 13. However, in the notes corresponding with this listing, Debtor states that property has a Fair Market Value of \$650,000, which the Debtor discounts down to \$598,000 after deducting 8% for the cost of sale. Debtor stating the current value of the Property on Schedule A/B under penalty of perjury is to state the value of the property, not the net sales proceeds. Thus, we begin with a value of \$650,000.

On Schedule C Debtor claims an exemption of \$557,000 in the Property, citing to California Code of Civil Procedure § 704.730. California Code of Civil Procedure § 704.730 provides, as of January 1, 2021, that the homestead exemption amount is the greater of the median sale price for a single-family home in the county in which it is located or \$300,000. Debtor asserts that the median sales price for homes countywide in Nevada County for 2020 was \$557,000.

On Schedule D, Debtor lists a secured claim in the amount of (\$102,000) which encumbers the Property with a deed of trust or mortgage. Presumably this predates Creditor's judgment lien.

Debtor filed the Motion to Avoid the judgment lien on June 4, 2021. In addition to the deed of trust, Debtor identifies another senior judgment lien in the amount of (\$132,955), which Debtor is also seeking to avoid in another Contested Matter. In the Objection, Creditor asserts that the value of the property is much greater than the \$598,000 asserted by Debtor, noting that in addition to a home, it includes forty-two (42) acres.

This appears to be a situation that may lead to an interesting battle of experts, or with the experts' information in hand, the parties coming up with a resolution consistent with California and Federal law.

A look at Schedule I provides some interesting information. Debtor is unemployed and states having monthly income of \$600 from rental property or business and \$1,800 in unemployment compensation. Dckt. 1 at 30-31. No profit and loss statement, as required in ¶ 8a of Schedule I is provided for the \$600 in monthly income.

Looking at Schedule J, Debtor lives a very tight, almost destitute lifestyle. She has gas, repair and maintenance expenses of only (\$130) a month, with a vehicle insurance expense of (\$230) a month. *Id.* at 33. On Schedule A/B, Debtor states under penalty of perjury that she has no vehicle, but drives a 2008 Land Rover for which "title" is in Peter Baga, as is the loan on the vehicle. Further, that this vehicle "Does not belong to Debtor." *Id.* at 14.

On the Statement of Financial Affairs Debtor states under penalty of perjury that she was unemployed in 2019, 2020, and now 2021. *Id.* at 35-37.

Trustee's Objections to Exemption Pending

Trustee notes that two objections to exemptions are pending, one for July 20, 2021 and one for August 10, 2021. Dckt. 51.

July 20, 2021 Hearing

Currently pending before the court are two Objections to Exemption that relate to the property at issue. Until that is determined, the court is not going to proceed with this litigation that is dependent on that prior determination.

At the hearing the parties agreed to continue this for a Status Conference, pending the prosecution of the Objection to Exemption.

Objection to Exemption

Debtor's Plan relies on two Motions to Avoid Liens. In turn, the avoidance could only be successful depending on the amount of Debtor's allowed homestead exemption.

The court having found that Debtor's homestead exemption is \$460,000, one Motion to Avoid Lien was granted only in part, leaving creditor Jonathan Neil & Associates with an \$88,000 secured claim that is not provided for in this plan. The court avoided the judgment lien of Cadles of West Virginia, LLC in its entirety.

August 17, 2021 Hearing

At the August 17, 2021 hearing, the court continued this to be conducted in conjunction with the continued hearings on the Motions to Avoid Liens.

October 20, 2021 Hearing

At the hearing, the parties agreed to continue the hearing for further scheduling in light of the pending evidentiary hearing on the Motion to Avoid the senior judicial lien.

October 28, 2021 Hearing

At the hearing, ~~XXXXXXXXXX~~

~~The court shall issue a minute order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick (“Trustee”), holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Objection to Confirmation of the Plan is ~~xxxxx~~, and the proposed Chapter 13 Plan ~~is/is not~~ confirmed.~~

~~**IT IS ORDERED** that the Objection is overruled, and Cindy Forgrave’s (“Debtor”) Chapter 13 Plan filed on April 29, 2021, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on June 9, 2021. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The hearing on the Objection to Confirmation of Plan is XXXXXX.

Creditor Cadles of West Virginia ("Creditor"), opposes confirmation of the Plan on the basis that Plan seeks to avoid its lien over Debtor's property. The Objection was untimely filed and the court has taken it as a pleading in support of Trustee's timely filed Objection to Debtor's Plan. The court discusses Creditor's argument as part of the Trustee's Objection set for hearing on June 29, 2021 at 2:00 p.m.

Objection to Exemption

Debtor's Plan relies on two Motions to Avoid Liens. In turn, the avoidance could only be successful depending on the amount of Debtor's allowed homestead exemption.

August 17, 2021 Hearing

At the August 17, 2021 hearing, the court continued this to be conducted in conjunction with the continued hearings on the Motions to Avoid Liens.

October 20, 2021 Hearing

At the hearing, the parties agreed to continue the hearing for further scheduling in light of the evidentiary hearing to be conducted on the Motion to Avoid the senior judicial lien.

October 28, 2021 Hearing

At the hearing, XXXXXXXXXXXX

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by Creditor Cadles of West Virginia (“Creditor”), holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of the Plan is ~~xxxxx~~, and the proposed Chapter 13 Plan ~~is/is not~~ confirmed.

IT IS ORDERED that the Objection is overruled, and Cindy Forgrave’s (“Debtor”) Chapter 13 Plan filed on April 29, 2021, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.
